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Trial

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

12 CR 223 (VM)

5 JOHNNY MORGAN,

6 Defendant.

7 -----x

New York, N.Y.  
September 30, 2013  
9:30 a.m.

9 Before:

10 HON. VICTOR MARRERO,

11 District Judge

12 APPEARANCES

13 PREET BHARARA

14 United States Attorney for the  
Southern District of New York

15 AMY GARZON

16 JOAN M. LOUGHNANE

Assistant United States Attorney

17 SEWARD & KISSEL LLP

Attorneys for Defendant

18 RITA M GLAVIN, ESQ.

DAVID DRISCOLL, ESQ.

19 MICHAEL WEITMAN, ESQ.

BRIAN MALONEY, ESQ.

20 MICHAEL BROZ, ESQ.

21 Also present:

22 Jama Joseph, NYPD

Danielle Craig, paralegal

23 Katy Rogers, Paralegal

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1 (Case called)

2 (In open court)

3 THE COURT: Good morning. This is a proceeding in the  
4 matter of United States v. Johnny Morgan, docket number 12 CR  
5 223 and it's scheduled as the commencement of the defendant's  
6 trial on the government's charges against him in this matter.  
7 There are a number of housekeeping and preliminary issues that  
8 need to be addressed before we proceed to call in a jury pool.

9 First, the government had submitted motions in limine  
10 with respect to testimony from some of its witnesses that the  
11 government sought to limit cross-examination about. The  
12 defense submitted a memorandum in response to the government's  
13 motion which the Court has reviewed. I want to address whether  
14 the government has any further response or replies to the  
15 defense opposition to the motions in limine.

16 Over the weekend the Court also received two  
17 submissions from the defense. One is a request to postpone the  
18 trial in order to allow for the Court to schedule a Daubert  
19 hearing with respect to the government's DNA evidence in this  
20 case that rests on what the defense contends is questionable  
21 basis for insufficient backup. Second, the defense asks for  
22 preclusion of the government's DNA report on the grounds that  
23 the government's witness, who will testify about the DNA tests  
24 taken at the medical examiner's office, was not the person who  
25 conducted the actual test but someone who reviewed the tests a

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1 couple of weeks after they had been conducted, that is, the  
2 particular tests at issue here.

3 Let me first ask the government whether it received  
4 and reviewed the two submissions from defense counsel that I  
5 just described and also the response to the motions in limine.

6 MS. GARZON: Yes, your Honor. Good morning. I guess  
7 I'll start with -- yes, we did receive defense counsel's  
8 submissions over the weekend. And I can start with those  
9 submissions if your Honor prefers.

10 THE COURT: All right, why don't we do that since  
11 there's a request to postpone the trial.

12 MS. GARZON: As the government explained to the  
13 defense this weekend upon obtaining that information the  
14 government would object to a postponement of the trial but I'd  
15 like to provide some background to your Honor as to why this is  
16 the government's position. The defendant here had this report  
17 that's now become in issue since June of 2012. That report  
18 reflected the type of testing that was conducted in this case.  
19 The government then provided the same report to the new defense  
20 counsel in this case on September 4. It again provided that  
21 report to defense counsel on September 9 when it made its  
22 expert notice.

23 The government also requested that the defendant  
24 provide reciprocal notice of any expert that they intended to  
25 recall. The government did not receive any notice until on or

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1 about September 26 of an expert that they would intend to call  
2 in this case. The name provided was Dr. Eli Shapiro. We had  
3 not obtained any information about Dr. Shapiro including any  
4 summary of the opinion that he was expected to give at trial.  
5 So over the weekend the government really learned for the first  
6 time first, that the defense was going to call another expert  
7 witness, I think his name is Mr. Eric Carita. It also did not  
8 get any background or documents for Mr. Carita.

9 The government's position is that the defendant has  
10 had this information all along. Any Daubert motions could have  
11 been made way in advance of this trial. It wasn't necessary to  
12 wait until the eve of trial to make these kinds of motions.  
13 Nonetheless, the government, if your Honor is inclined to grant  
14 the adjournment, would consider foregoing the DNA evidence so  
15 that trial can continue as scheduled.

16 THE COURT: All right. Let me just, not to invite any  
17 debate on this thing. The Court is not inclined to postpone  
18 this trial. It's been on the Court's docket for a long, long  
19 time. I agree with the government that the defense has had  
20 this DNA report long enough for it to have reviewed it and  
21 responded to it appropriately through its own expert if it  
22 wished to do so.

23 Ms. Glavin, you perhaps can address the government's  
24 observation that defense provided a name of one expert and then  
25 over the weekend switched to another without providing any form

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1 of information about who the person is, anything that would  
2 enable the government to do whatever form of background check  
3 of the expert's eligibility to testify at this proceeding.

4 MS. GLAVIN: Your Honor, with respect to the first  
5 point about the defense having the report. The report nowhere  
6 says, the report that the defense was provided apparently since  
7 June of last year, certainly before I became involved in the  
8 case, as you know, the report nowhere states that the DNA  
9 testing done in this case was low copy network testing.  
10 Nowhere. So the defense had no idea that this new technology  
11 had been used in the second set of testing. There is nothing  
12 in the report that would have indicated that. And in fact the  
13 report that the government provided to us said that the testing  
14 was, it indicated the same sort of type, STR testing. LCN  
15 testing is a subset of that, that has been the form of the  
16 controversial testing that is now the subject of at least as I  
17 understand it three different Frye hearings right now in the  
18 various boroughs of Manhattan. So the defense was not put on  
19 notice that low copy network testing was at issue in this case  
20 and we did not find out that that was low copy network testing,  
21 because we had no intent to challenge the admissibility of  
22 these DNA reports until on Thursday afternoon we met with the  
23 government's expert at the office of the County Medical  
24 Examiner and it was only during the course of our meeting with  
25 that individual that we learned for the first time that this

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1 testing involved was the low copy testing that has been the  
2 subject of some challenges.

3 The next day we were hoping that we would have called  
4 Dr. Eli Shapiro. The next day on Friday we talked to our DNA  
5 consultant about this and about low copy testing, his name is  
6 Eric Carita and he laid out for us the issues with respect to  
7 that. It was only at that point -- and I want your Honor to  
8 understand a couple of other things, too. We reached out  
9 because of my concern about that form of testing because we did  
10 legal research over the weekend. We reached out to the Federal  
11 Defenders to get a sense from them about whether, what this LCN  
12 testing was and if it had been challenged before. My  
13 understanding from communications with David Patton is that  
14 this hasn't been challenged here before but it is the subject  
15 right now of Frye hearings throughout the city and no appellate  
16 court has ruled on it.

17 When we made that motion for an adjournment I can  
18 assure you that I was not happy about it. Because we wanted to  
19 go to trial on Monday. But to have any type of meaningful  
20 cross of the government's expert about that unique form of  
21 testing I am going to need an expert familiar with that unique  
22 form of testing, not just your regular DNA expert. And that is  
23 my grave concern, because I do not believe I can effectively  
24 cross-examine the defense expert about low copy testing unless  
25 I have an expert sitting next to me who can point me to the

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1 main issue with the low copy network testing is its  
2 non-reproducibility and its stochastic effects. So that is why  
3 we asked for the adjournment.

4 I was reluctant because I know my client wanted to  
5 have a trial today. I spoke to him at length about this issue  
6 because he did not know this was low copy network testing that  
7 had been involved the second time in this case. And it is his  
8 view that he wants us to raise the issue and to challenge it  
9 and I don't think there's any more critical challenge that the  
10 defense can make in the case and, frankly, I think it would be  
11 ineffective assistance if we did not make this motion.

12 The defense has not been on notice since June 2012  
13 that this was low copy network testing. We knew it was a DNA  
14 test done and my understanding is it was done pursuant to the  
15 standard DNA procedures and not LCN testing. That is why we  
16 need an adjournment to discuss the issue, your Honor. There's  
17 only one federal court in the United States that has opined on  
18 the reliability of LCN testing. So that's the first issue.

19 The second issue --

20 THE COURT: Before you move to the second issue, the  
21 government indicated that it would be prepared to proceed  
22 without the DNA evidence rather than adjournment.

23 MS. GLAVIN: Yes, your Honor. If the DNA were out of  
24 the case entirely we're ready to go forward today.

25 MS. GARZON: Your Honor, if I may just speak on that

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1 issue briefly. Given that this Daubert challenge was brought  
2 on the eve of hearing I just want to state a couple of things  
3 here. Although defense counsel, she has acknowledged there's a  
4 second report here, that second report while it does not say  
5 low copy it does say it is a different test and that is a high  
6 sensitivity PCR test. So I just want to put that on the record  
7 and that is low copy DNA testing. Any expert had they been  
8 provided that report in 2012 could have informed the defense of  
9 that.

10 But to address the second issue of whether we'd forego  
11 the DNA evidence, I just want the record to be clear that it is  
12 a substantial piece of evidence that the government would be  
13 foregoing, so in that respect the government would ask that if  
14 it does forego the DNA evidence no reference be made to the DNA  
15 evidence in this trial either by the government or for the  
16 defense.

17 THE COURT: Ms. Glavin?

18 MS. GLAVIN: Your Honor, the report does not even say  
19 it was high sensitivity testing and there are different types  
20 of high sensitivity testing of which LCN is one and this does  
21 not say LCN. It says high sensitivity PCR DNA testing. PCR is  
22 the standard DNA test. Low copy network is what is in all of  
23 the literature, your Honor. Low copy network is what has been  
24 referred to in Judge Gleeson's opinion and in the District of  
25 New Mexico, and low copy network is a very unique form of this



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1 high sensitive testing. If we weren't dealing with low copy  
2 network and we were dealing with your standard testing we would  
3 be going forward today without question.

4 THE COURT: The government proposes that if it  
5 proceeds to the trial without the DNA tests that no reference  
6 be made by either the government or the defense.

7 MS. GLAVIN: Your Honor, we agree with that with one  
8 exception. We are entitled in closing to raise what evidence  
9 there is and what evidence there is not in this case.

10 MS. GARZON: Your Honor, the government would not  
11 agree to that. That would be misleading. There is DNA  
12 evidence in this case. The government is willingly foregoing  
13 it so this trial can proceed despite having given ample notice  
14 to the defendant of the type of testing done in this case so  
15 the government would oppose any such reference throughout the  
16 trial or in summation.

17 THE COURT: Ms. Glavin, when you mention what evidence  
18 there is not, if you at that point say you've heard the  
19 evidence the government has proposed and now let me tell you  
20 the evidence that there is, where is the DNA evidence --

21 MS. GLAVIN: Right.

22 THE COURT: I think that's asking, essentially, you  
23 want the cake and eat it too.

24 MS. GLAVIN: No, your Honor. Because the jury is  
25 going to hear there was no fingerprint evidence done, they're

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1 going to hear there was no gunshot residue tests done, and if  
2 there is no evidence, period, offered in this, it is a fair  
3 comment on the evidence that has been introduced in the four  
4 corners of this courtroom.

5 THE COURT: Is there fingerprint evidence?

6 MS. GLAVIN: No.

7 THE COURT: There is DNA evidence.

8 MS. GLAVIN: There is DNA evidence, but what the  
9 government is saying is they are not --

10 THE COURT: Again, you can't have the cake and eat it  
11 too. Either you want the evidence or you don't want it. If  
12 you agree not to have it then you can't say where is the DNA  
13 evidence because you know it exists. In that case we'll just  
14 postpone the trial and the DNA evidence will come in.

15 MS. GLAVIN: Let me -- well, the DNA evidence would  
16 come in, your Honor. I would assume that you haven't prejudged  
17 whether it would come in if we have an expert and we discuss  
18 this specific --

19 THE COURT: I understand there is a more likelihood it  
20 will come in then than there is now.

21 MS. GLAVIN: Let me have a moment to discuss this with  
22 Mr. Morgan.

23 THE COURT: Yes.

24 (Pause)

25 MS. GLAVIN: Your Honor, we'll go forward today.

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1 THE COURT: Next issue. Ms. Glavin, you had a second  
2 issue or second matter you wanted to address.

3 MS. GLAVIN: Oh, your Honor, I don't think we need to  
4 get into it. It was with respect to the experts.

5 THE COURT: All right. Yes?

6 MS. GARZON: Your Honor, I'd just like to clarify,  
7 then, that there will be no reference, either through the  
8 questioning of witnesses, in the opening, the summation to DNA  
9 evidence.

10 THE COURT: That's my understanding.

11 MS. GARZON: Then I guess the next item on the agenda,  
12 your Honor, is the government's motion in limine. I don't know  
13 how much detail your Honor would like me to get into.

14 THE COURT: Well, if you have the defendant's  
15 response.

16 MS. GARZON: Yes. I mean, there's not much more to  
17 add. The government's position is that the lay witnesses' old  
18 convictions and/or arrests are not the proper subject of  
19 cross-examination here. Their prior convictions and arrests  
20 are either close to or over ten years old and they just do not  
21 bear on the witness' credibility and for that reason it should  
22 not be --

23 THE COURT: All right, let's take them one at a time.  
24 The defense highlights one witness's arrest for theft of an  
25 auto or what they claim to be theft of an auto for 30 minutes

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1 and they allege that theft of an auto could certainly be  
2 something that bears on truthfulness and probating.

3 MS. GARZON: But, your Honor, I do believe that  
4 conviction is over ten years old so it's precluded by the very  
5 terms of Rule 603. I mean 609, your Honor.

6 THE COURT: And what about the drug convictions and  
7 arrests that are pending?

8 MS. GARZON: Again, your Honor, arrests are just  
9 simply not included within the rule. The rule contemplates  
10 convictions only.

11 THE COURT: Understood.

12 MS. GARZON: So the arrests should totally be out. As  
13 far as the drug conviction, there's no -- aside from being old,  
14 although they're not ten years old, they're certainly nine to  
15 eight years old, so they are old convictions, and they just do  
16 not bear on the witness's credibility here. I think in each  
17 instance for each witness actually they accepted responsibility  
18 for what they had done and they pleaded guilty. There's no  
19 question that they took responsibility for what they did. The  
20 crime itself inherently does not require the proof of any act  
21 of falsehood or dishonesty, so it's just simply not within Rule  
22 609.

23 THE COURT: Okay. What about the 911 witness?

24 MS. GARZON: Yes, your Honor.

25 THE COURT: The issue there is whether or not that

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1 witness is available and if the witness is available why did  
2 not the government produce the witness.

3 MS. GARZON: I think although that's the way the  
4 defense has presented it I think the rule makes clear it  
5 doesn't matter whether the witness is available or not. It  
6 falls right into one of the hearsay exceptions, here either  
7 present tense impression or excited utterance. If your Honor  
8 has had an opportunity to listen to the call, the person on the  
9 call, the 911 caller is telling the operator what's happening  
10 as it's happening. It's responding to the operator in terms of  
11 where is this person --

12 THE COURT: Let me stop you, Ms. Garzon. The question  
13 is whether or not the government intends to bring in the  
14 witness.

15 MS. GARZON: We would like to, your Honor. We're just  
16 not sure that is going to happen. And if I may elaborate on  
17 that, your Honor, we're just not sure he is going to appear.  
18 The witness here was a victim of a violent crime a couple of  
19 years ago, more like three years ago and he's still very  
20 reluctant and very worried for his and his family's safety so  
21 the government just has no assurance that he would appear in  
22 court. He is under subpoena.

23 THE COURT: Just make a decision now one way or the  
24 other and that way you can dispose of the question.

25 MS. GARZON: We did have a conversation with him late

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1 last week. All indication is that he's not going to appear.  
2 We'll keep trying, but we'd like to get a ruling from your  
3 Honor so we know whether we can proceed with the 911 call so at  
4 least we can start with that.

5 THE COURT: My ruling is this is an excited utterance  
6 and with regard to the 911 call it's admissible.

7 MS. GLAVIN: Your Honor, with respect to that, there  
8 were several calls to 911 that night between Mr. Santa is the  
9 witness and the 911 operator. There were at least two,  
10 possibly three. What the government wants to do is just  
11 introduce the first call that night. Under Rule 806 we intend,  
12 then, to call Mr. Santa because we -- if they are offering an  
13 out-of-court statement under the hearsay exception if the  
14 declarant is not testifying at trial we have the right under  
15 Rule 806 to impeach that declarant's statement. If Mr. Santa  
16 doesn't testify we would have to call him and cross-examine him  
17 because there is impeachment evidence about his description of  
18 the person in the subsequent calls who he says he saw that we  
19 think is material to the defense case and goes directly to the  
20 reliability of his excited utterance on the 911 call.

21 In addition, as set forth in the defendant's papers,  
22 the government points out that Mr. Santa was the victim of a  
23 violent crime of 2010. What happened in 2010 based on the 3500  
24 material that we received from the government, Mr. Santa is,  
25 he's a 23 or 24-year-old man. In 2010 he was stabbed. He did

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1 not -- and he went to the hospital. Mr. Santa didn't report  
2 that he was stabbed to the police until approximately two weeks  
3 after it happened and when he went to the police he identified  
4 the person who stabbed him as a man who lived across the street  
5 from him and that he would see approximately 15 to 20 times a  
6 week. Based on that, the Bronx District Attorney's office  
7 believed him and arrested that man. Approximately eight months  
8 later Mr. Santa called back the District Attorney's office and  
9 told them I think I saw the man that stabbed me and it's  
10 somebody else so please release the man I initially identified  
11 who lives across the street and I see 15 to 20 times a week and  
12 arrest this new man. And the Bronx District Attorney's office  
13 then began to question his reliability and what he had  
14 initially told them and his response was all black people look  
15 alike. The Bronx District Attorney's office had to dismiss the  
16 case.

17 So Mr. Santa's credibility with respect to that first  
18 911 call is going to be critical at this trial for the  
19 description that he gives the police, especially if it's coming  
20 in under a hearsay exception. The one or two subsequent calls  
21 he has within 20 minutes after his first 911 call with the 911  
22 operator are also going to be important as to credibility.  
23 That is why we think the excited utterance, your Honor, while  
24 it can come in we think will be misleading to the jury without  
25 being able to bring in all this impeachment evidence about who

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1 the 911 caller is and his ability to identify.

2 THE COURT: All right, Ms. Garzon, address the Rule  
3 806 issue.

4 MS. GARZON: Yes, your Honor, and I believe that  
5 brings us to defense counsel's motion on whether or not they  
6 should be able to cross-examine Mr. Santa's statement that all  
7 black people look the same. First if I may provide more detail  
8 that was left out by defense counsel's recitation. Mr. Santa  
9 was not stabbed. He was slashed in the neck by a known person  
10 in the neighborhood. That slashing required 17 stitches. As  
11 your Honor may imagine that was a difficult situation for him  
12 and continues to be. He did to his credit in that case when he  
13 realized he had ID'd the wrong person go back to the ADA and  
14 say I misidentified the person, you should release that person  
15 from jail. As reflected in the government's 3500 he did not  
16 feel it was appropriate to have someone in jail who did not  
17 commit a crime. So whatever mistake Mr. Santa made after  
18 having been the victim of a slashing, he went ahead and  
19 corrected it.

20 Now, whether he ID'd a victim in that case is not  
21 relevant to his testimony here. We didn't expect he would ID  
22 the defendant. In fact, he was shown a photo array by the  
23 detectives in this case and he could not ID the defendant. If  
24 he did appear and the government was to call him as a witness  
25 we don't expect he would be able to ID the defendant in this



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1 case. What he says in the 911 call is simply there's a man in  
2 the street with a gun. When the operator asked him where is  
3 the man he states the location where the man is. The operator  
4 then asks him what is he wearing and he says a black shirt -- a  
5 black jacket and a white T-shirt. Again, the identity of the  
6 defendant here is just not something within the realm of which  
7 Mr. Santa can testify. Therefore, what Mr. Santa did three  
8 years ago in a case where he admittedly mistakenly identified  
9 somebody is just simply not relevant to identification here  
10 because there is no identification.

11 THE COURT: Ms. Glavin?

12 MS. GLAVIN: Your Honor, we're not going to contest  
13 that Mr. Santa can't identify the defendant but what is  
14 critically important is that Mr. Santa says I see a man with a  
15 black leather jacket, a black man, and he has a gun. A  
16 critical part of our case is that Mr. Morgan did not have a gun  
17 and Mr. Santa didn't see him having a gun that night and  
18 therefore Mr. Santa's ability to perceive and see what is going  
19 on at 4:00 in the morning that he's looking out a window into  
20 the dark is going to be critical. The fact that Mr. Santa  
21 previously identified someone as an attacker who he knew and  
22 saw 15 to 20 times a week is directly critical and relevant as  
23 to whether or not he could have accurately perceived what he  
24 saw at that particular time at 4:30 or 5:00 in the morning on  
25 that evening. But, so that's the first part.

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1           The second part, your Honor, is in the two subsequent  
2 calls that Mr. Santa has with the 911 operator, he provides  
3 that 911 operator with additional information. He tells the  
4 911 operator that he believes the man that he saw has a or  
5 drives a Honda Odyssey and that he's headed towards Barclay  
6 Avenue. There will be testimony in this trial that Mr. Morgan  
7 doesn't have a Honda Odyssey or anything that even looks like  
8 that. So what he perceived is going to be critical and the  
9 jury should be able to hear, if they offer that 911 call as a  
10 hearsay exception they need to understand the whole context of  
11 the series of conversations with the 911 operator and his  
12 history of not being able to perceive someone correctly. I  
13 wouldn't be making this argument in respect to his attack in  
14 2010 when he was a victim if Mr. Santa just randomly identified  
15 somebody out of a lineup but it was the fact that Mr. Santa at  
16 that time identified somebody he knew and said he saw 15 to 20  
17 times a week as his attacker and then changed his mind.

18           THE COURT: All right. Thank you.

19           MS. GARZON: Your Honor, I'm failing to see how  
20 identifying a person bears on whether that same person can  
21 perceive a gun. I think the defense's argument really is about  
22 the circumstances under which Mr. Santa saw the gun. I don't  
23 think it has anything whatever to do with whether it was this  
24 defendant and whether one can see a person and identify that  
25 person is just simply very different as to whether one can see

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1 a gun. You can't misidentify a gun. It's either a gun or it's  
2 not a gun.

3 THE COURT: All right, thank you. I will rule that if  
4 the excited utterance comes in under 806 the defense can bring  
5 in Mr. Santa and cross-examine him on anything that may pertain  
6 to his reliability, the witness's ability to identify what he  
7 said he saw in the 911 call and any possible reason for bias,  
8 for example, to the extent that any bias he may have against  
9 any particular ethnic or racial group might have affected his  
10 perceptions or his motives. I think those are all relevant  
11 considerations.

12 MS. GLAVIN: Your Honor, with respect to that, I just  
13 ask, I know Mr. Santa is under subpoena, so I would ask that  
14 the government inform Mr. Santa that he remain under federal  
15 trial subpoena to appear in court.

16 THE COURT: All right.

17 MS. GARZON: Yes, your Honor. We've served the  
18 subpoena and we've explained to him what it means multiple  
19 times.

20 THE COURT: All right. Is there anything else from  
21 the government, anything else outstanding?

22 MS. GARZON: Your Honor, I don't believe we've gotten  
23 any rulings on the other prior convictions and arrests of the  
24 other lay witnesses.

25 THE COURT: The other prior convictions and arrests,

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1 insofar as any of them are over ten years old, the Court rules  
2 that they would not be admissible. To the extent that the  
3 arrests are for drug offenses, the Court is not persuaded that  
4 they bear on the witness's credibility so I will exclude  
5 cross-examination on those grounds on those matters.

6 MS. GARZON: Yes, and then I just believe there's the  
7 one piece for prior drug use.

8 THE COURT: That's the witness who is currently under  
9 prosecution for drug use?

10 MS. GARZON: I don't believe he's currently under  
11 prosecution. He was arrested for --

12 THE COURT: He has a pending case.

13 MS. GARZON: Yes, I forget the term for it, if I may.  
14 It's adjourned in contemplation of dismissal which basically  
15 means if he behaves himself for the next few months it goes  
16 away, it's dismissed.

17 THE COURT: All right, I will preclude that  
18 cross-examination on the same basis that it does not bear on  
19 questions of credibility on serious crime.

20 MS. GLAVIN: Your Honor, with respect to whether or  
21 not that particular witness is a current drug user we would ask  
22 to be able to cross-examine on that point because it goes to  
23 his ability to perceive the condition he may be in when he  
24 testifies today and through our independent research --

25 THE COURT: The issue is not whether he's a drug user

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1 today, it's whether his perception may have been impaired at  
2 the time that he saw what he saw.

3 MS. GLAVIN: And we have reason to believe he was a  
4 marijuana user back then.

5 THE COURT: Was he using marijuana at the time that he  
6 perceived what he's going to testify to.

7 MS. GLAVIN: We don't know, which is why we'd like to  
8 be able to cross on it.

9 MS. GARZON: Your Honor, we've inquired and we were  
10 told by the witness that he was not smoking marijuana or using  
11 any drugs at that time.

12 THE COURT: Cross-examination will bring that out.  
13 All right. Anything else?

14 If there is nothing else, then let me check the status  
15 of the jury pool.

16 (Pause)

17 THE COURT: We've been informed that the jury pool the  
18 earliest will be here at 10:30, they are now seeing the  
19 orientation film, so we will adjourn until about 10:30.

20 (Recess pending jury selection)

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1 (A jury of 12 and two alternates were selected and  
2 sworn)

3 THE COURT: Thank you. Be seated.

4 Now, I am going to proceed with some brief preliminary  
5 instructions. After that I will ask the parties whether they  
6 have opening statements that they wish to make. My preliminary  
7 remarks should take about 20 minutes or so. I understand that  
8 the parties may present opening statements that will last  
9 roughly ten minutes apiece, so that we should be able to  
10 complete today's proceeding by around 5 p.m. And then we will  
11 adjourn for the day and resume with the actual beginning of the  
12 presentation of the evidence tomorrow morning.

13 Now, these comments are not intended to be a  
14 substitute for the detailed instructions on the law and the  
15 evidence that I will give you at the conclusion of the case  
16 before you retire to your deliberations. Rather, these remarks  
17 are a simple explanation of your duties and responsibilities  
18 and the basic principles of law which are likely to be involved  
19 in this case.

20 As a preliminary matter, I would like to review with  
21 you the trial schedule. As I have already indicated, we expect  
22 that the trial will last approximately one week. And I say  
23 "approximately" because there is part of that schedule that is  
24 not in our control. The parties expect that the presentation  
25 of the evidence may conclude sometime by Thursday or so. If it

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1 is, then you will receive the case for your consideration. And  
2 how long you need to conclude your deliberations is a matter  
3 entirely up to you and not something that we will control. But  
4 at the very least those portions of the trial that are involved  
5 in the presentation of the evidence and instructions should  
6 conclude before the end of the week.

7 In this court I start the day at 9 o'clock in the  
8 morning sharp -- not 9:15, not 9:30 but 9 o'clock when we  
9 indicate 9 o'clock -- and we continue until roughly 5 o'clock,  
10 unless for some reason we need additional time. And as I  
11 indicated earlier, if we do, we will try to give you enough  
12 advance notice so that you can plan accordingly. It is  
13 extremely important that you will allow sufficient time in the  
14 morning to ensure that you arrive at the designated time,  
15 because the trial cannot start until all of you are present and  
16 delays could result in having to stay later or even prolonging  
17 the trial beyond the one week that we estimate it should take.

18 We will take a lunch break every day at approximately  
19 12:45 or 1 o'clock for roughly an hour, unless we are making  
20 good time. We also will take two ten-minute breaks or so, one  
21 in the morning, one in the afternoon. If at any time any of  
22 you wants the Court to declare a brief recess for any reason,  
23 just raise your hand and let me know and we will take a  
24 five-minute recess, no questions asked. We will be glad to  
25 accommodate you in this respect.

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1           Your purpose as jurors is to find the facts and  
2 determine factual issues. The jury is the sole judge of the  
3 facts in this case. Your task is to decide factual issues  
4 based on the evidence presented to you, and then to apply the  
5 facts as you determine them to the law contained in my  
6 instructions at the conclusion of the trial.

7           As I mentioned during the jury selection process, the  
8 question of punishment is for the Court alone to determine and  
9 must not enter into your deliberations on the guilt or  
10 innocence of the defendant. You may not speculate as to the  
11 potential punishment or sentence that the defendant you are  
12 considering may face in connection with any of the charges or  
13 the charge brought against him by the government. Nor may you  
14 consider the question of punishment when you apply the facts to  
15 the law during your deliberations.

16           While you are the sole judge of the facts, the Court  
17 alone is the sole judge of the law. In other words, it is my  
18 role to preside at the trial, to rule on the various legal  
19 issues as they come up during the trial, and instruct you on  
20 the legal principles that you are to apply to the facts as you  
21 find them. The law as given to you by the Court constitutes  
22 the only law for your guidance. It is your duty to follow the  
23 law as I give it to you.

24           You are to determine the facts in this case solely  
25 from the evidence, which consists of, one, the sworn testimony



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1 of witnesses, regardless of which body may have called the  
2 witness; two, any video recordings, audio recordings,  
3 documents, physical things that may have been received in  
4 evidence, regardless of who produced the materials, and all  
5 facts which may be judicially noticed, if any, as well as all  
6 facts to which the parties have stipulated and which I instruct  
7 you to take as true for the purposes of this case.

8 Evidence is a very specific and limited concept. Not  
9 everything that you see and hear in the courtroom is evidence.  
10 For instance, what I say now or later is not evidence. Also,  
11 what the lawyers say in their opening statements and/or closing  
12 arguments is not evidence.

13 To put it affirmatively, evidence consists of the  
14 answers given by the witnesses from the witness stand under  
15 oath. It is the answer that is the evidence and not the  
16 question or how the question is asked. Obviously, to evaluate  
17 the answer you have to consider the question to which it was in  
18 response. As I mentioned, statements and arguments by counsel  
19 are not evidence in the case unless made as an admission or a  
20 stipulation, which means that the attorneys agreed to a certain  
21 fact. If the attorneys on both sides stipulate or agree to the  
22 existence of a fact, I will instruct you that you must accept  
23 the stipulation as evidence and regard the facts as proven.

24 On occasion I may tell you that I am taking judicial  
25 notice of certain facts or events. If I do, you may but you

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1 are not required to accept as conclusive any facts that the  
2 court may judicially notice.

3           You are to consider only the evidence in the case, but  
4 in your consideration of the evidence you are not limited only  
5 to the statements of the witnesses; in other words, you are not  
6 limited solely to what you see and hear the witnesses testify.  
7 You are permitted to draw from the facts which you find to have  
8 been proved such reasonable inferences as you feel are  
9 justified in light of your experience.

10           The decision on the facts of the case should not be  
11 determined by the number of witnesses testifying for or against  
12 a party. You should consider all of the facts and  
13 circumstances in evidence to determine which witnesses you  
14 choose to believe or not believe. You may find that the  
15 testimony of a smaller number of witnesses on one side is more  
16 credible than the testimony of a greater number of witnesses on  
17 the other side.

18           Finally, keep in mind that you must not consider  
19 anything that you may have read or heard about the case outside  
20 of the courtroom as evidence whether before or during the  
21 trial.

22           I would like to mention a few more principles about  
23 evidence which I think will help you as we proceed.

24           Some evidence is admitted for a limited purpose. If I  
25 instruct you that an item of evidence has been admitted for a

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1 limited purpose, you must consider it only for that limited  
2 purpose and for no other purpose.

3 Some of you may have heard the terms "direct" and  
4 "circumstantial" evidence. Direct evidence is simply evidence,  
5 like the testimony of an eyewitness, which, if you believe it,  
6 directly proves a fact. If the witness testified that he or  
7 she saw it raining outside and you believed that witness, that  
8 would be direct evidence that it was raining.

9 Circumstantial evidence simply is a chain of  
10 circumstances that indirectly proves a fact. If someone walked  
11 into the courtroom wearing a raincoat covered with water and  
12 carrying a wet umbrella, that would be circumstantial evidence  
13 from which you could conclude that it was raining outside.

14 It is your job to decide how much weight to give the  
15 direct evidence and circumstantial evidence. The law makes no  
16 distinction between the weight that you should give to either  
17 one and does not say that one is any better evidence than the  
18 other. You should consider all of the evidence, both direct  
19 and circumstantial, and give the evidence whatever weight you  
20 believe it deserves.

21 Part of your job as jurors, while determining the  
22 facts, is to decide how credible or believable each witness is.  
23 This is your job, not mine. It is up to you to decide if a  
24 witness' testimony is believable and how much weight you think  
25 it deserves. You are free to believe everything that a witness

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1 says, or only part of it, or none of it at all, but you should  
2 act reasonably and carefully in making your decisions.

3 Let me suggest some things that you may consider in  
4 evaluating the testimony of each witness.

5 Ask yourselves if the witness is able to see or hear  
6 the events in a clear manner. Sometimes even an honest witness  
7 may not have been able to see or hear what was happening and  
8 may make a mistake. Ask yourselves how good the witness'  
9 memory seems to be. Does the witness seem able to remember  
10 accurately what happened? Ask yourself if there is anything  
11 else that may have interfered with the witness' ability to  
12 perceive or remember events?

13 Ask yourselves about how the witness acts while  
14 testifying. Does the witness appear honest, or does the  
15 witness appear to be evasive? Ask yourself if a witness has  
16 any relationship to the government or the defendant, or  
17 anything to gain or lose from the case that might influence the  
18 witness' testimony. Ask yourself if the witness has any bias  
19 or prejudice or reason for testifying that might cause the  
20 witness to slant testimony in favor of one side or the other.

21 Ask yourselves whether the witness testified  
22 inconsistently while on the witness stand or if the witness  
23 said or did something at any other time that is inconsistent  
24 with what the witness said while testifying. If you believe  
25 that the witness is inconsistent, ask yourself if this makes

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1 the witness' testimony less believable. Sometimes it may;  
2 other times it may not. Consider whether the inconsistency is  
3 about something important or about some unimportant detail.  
4 Ask yourselves if it seems like an innocent mistake or if it  
5 seems deliberate.

6 And ask yourselves how believable the witness'  
7 testimony is in light of all of the evidence in the case. Is  
8 the witness' testimony supported or contradicted by other  
9 evidence that you find believable? If you believe that a  
10 witness' testimony is contradicted by other evidence, remember  
11 that people sometimes forget things, and even two honest people  
12 who witness the same event may not describe it exactly the same  
13 way.

14 These are only some of the things that you may  
15 consider in deciding how believable each witness is. You may  
16 also consider other things that you think shed some light on  
17 the witness' credibility. Use your own common sense and  
18 everyday experience in dealing with other people and then  
19 decide what testimony you believe and how much weight you think  
20 it deserves.

21 No statement or rule or remark or comment that I may  
22 make during the course of the trial is intended to indicate my  
23 opinion as to how should decide the case or to influence you in  
24 any way in determining the facts.

25 At times, I may ask questions of a witness. If I do,

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1 it may be to clarify a matter and should not be viewed in any  
2 way by you to indicate my opinion about the facts or to  
3 indicate the weight I feel you should give to the testimony of  
4 the witness.

5 Remember that you, as jurors, are at liberty to  
6 disregard all comments of the Court in arriving at your  
7 determination of the finding of fact.

8 Also, I may at times take notes. Keep in mind that  
9 whether or not I am taking notes at a particular time should  
10 not affect you or lead you to think that any one piece of  
11 information is more noteworthy than any other.

12 During the trial it may be necessary for me to confer  
13 with the parties from time to time out of your hearing  
14 concerning questions of law or procedure that require  
15 consideration by the Court alone. On some occasions you may be  
16 excused from the courtroom as a convenience to you and to us  
17 while I discuss these matters with the lawyers. These  
18 occasions will be kept to a minimum.

19 I will meet with the lawyers in the mornings before we  
20 get started with you and in the afternoons after you are sent  
21 home for the day in order to avoid, to the extent possible,  
22 interruptions when you are here, but you should remember at all  
23 times the importance of the matter that you are here to  
24 determine and, please, remember to remain patient.

25 (Continued on next page)

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Trial

1           THE COURT: The parties may sometimes present  
2           objections to some of the testimony or other evidence. You  
3           should not be prejudiced in any way against a lawyer or party  
4           who makes an objection. At times I may sustain objections and  
5           you may hear no answer to a question or, where an answer has  
6           already been made I may instruct you that the answer is to be  
7           stricken or removed from the record and I may direct you to  
8           disregard certain testimony or evidence. You must not consider  
9           any testimony to which an objection has been sustained or any  
10          evidence which I have instructed you to disregard.

11          The law requires that your decision be made solely  
12          upon the evidence before you. The testimony or evidence that I  
13          exclude from your consideration will be excluded because it is  
14          not legally admissible. In reaching a decision you must not  
15          draw any inference or conclusion from any unanswered question  
16          and you must not consider any testimony which has been stricken  
17          from the record.

18          I remind you if I sustain an objection it means I  
19          found the objection to be legally correct and the information  
20          to which it pertains should not be considered by you. If I  
21          overrule an objection it means I have found the objection to be  
22          incorrect as a matter of law so the information to which the  
23          information pertains may be considered by you as you consider  
24          the facts.

25          As you know this is a criminal case. There are three

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Trial

1 basic rules about criminal cases that you should keep in mind.  
2 First, the defendant is presumed innocent until proven guilty.  
3 The indictment against the defendant brought by the government  
4 is only an accusation, nothing more. It is not proof of guilt  
5 or anything else. The defendant therefore starts out with a  
6 clean slate. Second, the burden of proof is always on the  
7 government throughout the trial. The defendant has no burden  
8 to prove his innocence or to present any evidence or to  
9 testify. Since the defendant has a right to remain silent the  
10 law prohibits you from arriving at your verdict by considering  
11 that the defendant may not have testified. Third, the  
12 government must prove the defendant's guilt with respect to the  
13 count in the indictment beyond a reasonable doubt. I will give  
14 you further instructions on this point later but bear in mind  
15 in this respect a criminal case is different from a civil case.

16 As I mentioned, by the end of the trial I will give  
17 you detailed instructions on the law and those instructions  
18 will control your deliberations and decision but in order to  
19 help you follow the evidence I will give you a brief summary of  
20 the elements that the government must prove beyond a reasonable  
21 doubt to make this case with respect to the charge.

22 After you've heard and seen all the evidence in the  
23 case I will ask you to deliberate carefully according to my  
24 instructions and ultimately render a decision regarding the  
25 defendant's guilt or innocence for the count in the indictment



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Trial

1 with which he's been charged. To summarize, I will summarize  
2 the indictment. Later on you will have a copy of the actual  
3 indictment so don't worry about remembering everything I tell  
4 you now.

5 Count One charges Johnny Morgan with being a felon in  
6 possession of a firearm. Again, it is the government's burden  
7 to prove every element of the offense I have just described  
8 beyond a reasonable doubt. I will give you more specific  
9 descriptions and instructions related to the elements of the  
10 offense after you have seen and heard all the evidence in the  
11 case and begun your deliberations.

12 A few words on your conduct as jurors. I have just  
13 explained your role is to consider all the evidence before you  
14 and properly decide the facts. You must endeavor not to decide  
15 any issue or form any opinion in the case until you have heard  
16 all of the evidence, been instructed on the law by me and  
17 retired to the jury room to deliberate. When the case is  
18 submitted to you, which means at the end of the trial, you are  
19 not to discuss the case with anyone, not even your fellow  
20 jurors. Likewise, it would be improper for you to allow anyone  
21 to discuss the case in your presence. In addition, you must  
22 not talk to the parties or witnesses under any circumstances.  
23 Sometimes jurors have difficulty understanding why it is that  
24 they're not allowed to discuss the case with you. We ask you  
25 not to discuss the case because we want you to keep an open

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Trial

1 mind until you've heard all the evidence and my instructions  
2 regarding the law. Therefore, we ask you to avoid discussing  
3 the case with anyone until your deliberations begin. It's  
4 important that you strictly observe the rules, so that the  
5 rules will apply during a recess or a break at the trial to  
6 assure that the parties have a fair trial that they're entitled  
7 to by not allowing any outside influences, information or  
8 inferences to sway your consideration of the case.

9 I repeat, as I just mentioned, do not discuss the case  
10 among yourselves or with anyone else on the outside. Do not  
11 permit anyone to discuss the case with you in your presence. I  
12 realize this may be difficult because it may include family  
13 members, spouses, friends and good friends. But it is the only  
14 way that the parties can be assured of the absolute  
15 impartiality they're entitled to expect from you as jurors.  
16 Until you retire from the jury room at the end of the case do  
17 not talk about the case. Secondly, attorneys and parties in  
18 this case, as in any case, are instructed not to have any  
19 contact or to communicate with you in any way. If you should  
20 happen to see or to hear any of the attorneys or the assistants  
21 or anyone else involved in the case in the halls, in the  
22 elevators or anywhere in the trial and they do not greet you or  
23 somehow ignore you or your exchanges or look very awkward,  
24 please do not think they're being rude. They're only following  
25 the instructions of the Court given in any case.

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Trial

1 Third, it is important that you not read any newspaper  
2 articles or listen to the radio or television broadcast about  
3 the case, if any. Media accounts may be inaccurate and may  
4 contain information which is not proper evidence for you to  
5 consider. If there are any media reports about the case, avoid  
6 reading or watching them.

7 Fourth, do not try to do any research or any  
8 investigation in the case of your own. This includes any form  
9 of electronic means, internet, Facebook or social media of any  
10 kind, telephones. It is important that you avoid any such  
11 information in any of those media. If anyone should try to  
12 talk to you about the case you must bring that to my attention  
13 immediately, but not discuss it with your fellow jurors.  
14 Likewise, should you inadvertently come upon any information,  
15 read see or hear anything concerning the case you should inform  
16 me immediately.

17 Finally, do not attempt to form any opinion until  
18 after all the evidence is in. In fairness to the parties you  
19 should keep an open mind throughout the trial and reach a  
20 conclusion only during your deliberation after all of the  
21 evidence is in and you have heard the attorneys' closing  
22 argument, my instruction on the law and then only after an  
23 interchange of views with your fellow members of the jury.  
24 Thereby each of the parties will receive equal and fair  
25 consideration from you.

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Trial

1           If you want to take notes during the trial you may do  
2 so. However, it is difficult to take notes and pay attention  
3 to what the witnesses are saying at the same time. If you do  
4 take notes, be sure that your note taking does not interfere  
5 with your listening and consideration of all of the evidence.  
6 Also if you take notes do not discuss your notes with anyone  
7 before you begin your deliberations. Keep in mind that you  
8 will not be allowed to take your notes with you at the break  
9 time or at the end of the day or at the end of the trial. We  
10 will give you note pads to facilitate you taking notes but  
11 these should be left on your chairs during the breaks and lunch  
12 and at the end of the day. Whether or not you choose to take  
13 notes remember it is your own individual responsibility to  
14 listen carefully to the evidence. You cannot give this  
15 responsibility to somebody else who is taking notes. Notes  
16 should be used only to refresh the recollection of the juror  
17 who took the notes. You should not use notes in the jury  
18 deliberations to prove to other jurors that your notes are in  
19 fact what a witness said. Your notes reflect only your  
20 impression of what the witness said. We depend upon all our  
21 judgments, the judgments of all members of a jury, and you are  
22 all responsible for remembering the evidence in the case.  
23 Remember that notes are only aids to memory and should not be  
24 given precedence over your own independent recollection of the  
25 facts.

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Trial

1           You will notice that we do have an official court  
2 reporter making a record of the trial. Although you will not  
3 have a typewritten transcript of the trial made available to  
4 you for your use when reaching a decision in the case if you  
5 have questions about any portion or excerpt of the testimony it  
6 may be possible to have the excerpt read back to you. That  
7 said, if and when that happens it is very important for you to  
8 be as precise as possible about the testimony that you wish  
9 read back to you.

10           Finally, let me give you a summary of the order of  
11 proceedings. The trial will proceed as follows: The  
12 government will make an opening statement which is simply an  
13 outline to give you a frame of reference and help you  
14 understand the evidence as it comes in. Next, the defendant's  
15 attorney may but does not have to make an opening statement.  
16 What is said in these opening statements is not evidence. The  
17 government will then present its witnesses and counsel for  
18 defendant may cross-examine them. Following the government's  
19 case the defendant may if he wishes present witnesses whom the  
20 government may cross-examine. After all of the evidence is in  
21 the attorneys will present their closing arguments to summarize  
22 and interpret the evidence for you and what the parties feel  
23 the evidence has proved or not proved and what inference they  
24 believe you may draw from the evidence.

25           What the parties say in these closing arguments is not

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Trial

1 evidence, just as what they said in these opening statements is  
2 not evidence. Closing arguments are designed to present to you  
3 only their view of what the evidence has shown.

4 After you heard the closing arguments I will instruct  
5 you on the applicable law and then you will retire to  
6 deliberate on your verdict. Keep in mind that during your  
7 deliberations you will be permitted to see the exhibits that  
8 have been admitted into evidence during the trial and to have  
9 witness testimony read back to you if you so request.

10 With that, I will then call upon the parties to  
11 present their opening statements, government and defense. If  
12 you wish to take notes, the clerk will distribute note pads and  
13 pens to aid any of you who wish to do so.

14 Government?

15 MS. GARZON: Thank you, your Honor. May I proceed?

16 THE COURT: Yes.

17 MS. GARZON: In the early morning hours of  
18 February 20, 2012, that man, Johnny Morgan, walked into a  
19 nightclub, pulled out a gun and pointed it at another man. The  
20 other man, with the gun pointed at him, pleaded with the  
21 defendant to leave. The defendant left, but just a few minutes  
22 later he fired off four shots less than a block away from the  
23 club.

24 That night when the defendant possessed that gun he  
25 committed a federal crime because the defendant is a convicted

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Opening - Ms. Garzon

1 felon and federal law prohibits felons such as the defendant  
2 from possessing guns. And that, ladies and gentlemen, is why  
3 we're here today.

4 Now, let me tell you a little bit more about what  
5 happened during the early morning hours of February 20. The  
6 evidence will show that about 4:00 a.m. the defendant was in a  
7 club in the Bronx. When it was time to close the defendant did  
8 not leave as most other patrons did. Instead, a security guard  
9 had to ask him to leave. But the defendant did not listen and  
10 he did not leave. When he refused to leave security threw him  
11 out and the defendant was mad that he was thrown out of the  
12 club. So a few minutes later he came back. But this time he  
13 came back with a gun. Again, security asked him to leave.  
14 Again the defendant did not listen. Instead, the defendant  
15 pulled out a gun and pointed it at another man. That man  
16 turned out to be the owner of the club.

17 When the defendant pulled out the gun others in the  
18 club scattered, some running for cover, some running out the  
19 back door. The owner, with the gun pointed at him, again  
20 pleaded with the defendant to leave. He tried to calm the  
21 defendant down and eventually he convinced the defendant to  
22 leave the club. But the defendant was not done. When he got  
23 outside he fired four shots and you will hear from a witness  
24 who will tell you, who lived across the street, that he called  
25 911 when he heard those four shots. You will also hear that in

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Opening - Ms. Garzon

1 a few minutes after the defendant fired off the four shots the  
2 NYPD responded to a call reporting a man with a gun. The man  
3 with the gun was a few blocks from the club and close to where  
4 the shots had been fired. When the officers responded they saw  
5 the defendant. There was no one else around. The defendant  
6 was walking towards a corner on a deserted street at dawn. The  
7 officers called out to the defendant. They identified  
8 themselves as police. They told him to stop but the defendant  
9 did not listen and he did not stop.

10 Walking fast, the defendant tossed the gun. You will  
11 hear from an officer who will tell you that he saw the  
12 defendant's motion, motion his arm as if tossing a gun and that  
13 he heard a loud clang as an object hit the ground. In that  
14 very area where the defendant made that motion NYPD officers  
15 found a semiautomatic gun.

16 The NYPD also searched the area where the gun had been  
17 fired and in that area they found four spent shell casings, and  
18 that's simply the covering that comes off of a bullet when a  
19 bullet is fired. Those four shell casings match the very gun  
20 that was recovered where the defendant made the hand motion.  
21 The defendant was placed under arrest. That's what the  
22 evidence that this trial will show.

23 Now, let me tell you how we'll show that. How are we  
24 going to prove to you, the jury, that the defendant possessed  
25 the gun at dawn on that February day. First, you're going to



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Opening - Ms. Garzon

1 see the physical evidence in this case. You're going to see  
2 the evidence that was recovered when the defendant was  
3 arrested. You're also going to see the shell casings that were  
4 fired and recovered less than a block away from the club where  
5 the defendant pulled that gun. Second, you're going to see  
6 maps and pictures, including pictures of the defendant in the  
7 club that night.

8 Third, you're going to hear from multiple witnesses,  
9 including the 911 caller who called to report the shots fired.  
10 You're going to hear from the officers who saw the defendant  
11 make the motion as if throwing the gun from officers who placed  
12 the defendant under arrest and from officers who recovered the  
13 shell casings less than a block away from the club.

14 You're also going to hear from a detective in the  
15 firearms analysis section of the NYPD. He will talk to you  
16 about the ballistics, that is, the shell casings that were  
17 recovered in this case. And he will tell you that those shell  
18 casings match the gun that was recovered when the defendant was  
19 arrested.

20 You're also going to hear from people who were in the  
21 club that night. You're going to hear from the security guard  
22 who kicked the defendant out. You're also going to hear from  
23 the owner who had the gun pointed directly at him. Together  
24 this evidence will show that the defendant possessed the gun in  
25 the early morning hours of February 20, 2012.

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Opening - Ms. Garzon

1 Ladies and gentlemen, this will not be a lengthy trial  
2 but it is an important case. It's important for the defendant  
3 for the obvious reason that he stands accused of violating  
4 federal law and it's important for the government because the  
5 government is tasked with enforcing the federal gun laws.

6 Now, we'll have another chance to address to you at  
7 the end of the trial when all the evidence is in, but between  
8 now and then I'd like to ask you to do three things. First,  
9 pay close attention to the evidence as it comes in. Second,  
10 follow Judge Marrero's instructions on the law carefully, and,  
11 third, use your common sense when you're evaluating the  
12 evidence. That's the same common sense that you use in your  
13 everyday lives as New Yorkers. If you do those three things  
14 then I am confident at the end of the trial when all of the  
15 evidence is in and you, the jury, get the final word you will  
16 reach the only conclusion that is consistent with the evidence  
17 and the law, and that is, that Johnny Morgan is guilty beyond a  
18 reasonable doubt.

19 THE COURT: Ms. Glavin.

20 MS. GLAVIN: The most important piece of evidence that  
21 you're going to see in this case Ms. Garzon didn't mention to  
22 you. You're going to learn that there was a surveillance video  
23 outside that club that night -- the club is called the Pompeii  
24 Lounge -- and that surveillance video was obtained by the NYPD,  
25 and that surveillance video shows a good part of this incident

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Opening - Ms. Glavin

1 that the government alleges my client was involved in. The  
2 surveillance video shows my client interacting with the owner  
3 of the club and about three or four other guys. And when you  
4 see that surveillance video you're going to see he didn't have  
5 a gun, he wasn't the aggressor and he wasn't a man that left  
6 the club in anger, went out and grabbed a gun, walked into the  
7 club, up to the owner, cocked it and pointed it at him. You're  
8 going to see on that surveillance video, and I am praying to  
9 you to look at that video over and over again because the NYPD  
10 obtained the video from the pharmacy next door to this club and  
11 you're going to see this play out. Mr. Morgan didn't have a  
12 gun that night. That's why we're here and that's what this  
13 case is about.

14 Now, when you came in here this morning and I know  
15 it's been a long process, but when you came in here you were  
16 probably thinking to yourselves, you hear about the case, he  
17 probably did it. He got charged, why are we here, what's he  
18 doing over there, that Mr. Morgan. And, frankly, after I heard  
19 Ms. Garzon's opening, which was a very good opening, I'd be  
20 thinking why are we going to trial; what is there to argue  
21 about, open and shut, why are Ms. Glavin and Mr. Morgan wasting  
22 my time.

23 Well, you can't make up your minds and you especially  
24 can't make up your minds because of what the prosecution didn't  
25 mention in its case, and ask yourselves over and over again

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Opening - Ms. Glavin

1 when you see the surveillance video is that in any way  
2 consistent with what you're going to hear from the club owner  
3 and the security, his security guys that were working there  
4 that night.

5 Now, let's talk a little bit about what the evidence  
6 is going to be in the case. You're going to hear a little bit  
7 about this place, it's called the Pompeii Lounge. It's on East  
8 Tremont Avenue and it's in the Bronx. What you're going to  
9 hear about is that the Pompeii Lounge is fairly notorious, and  
10 the owners of the lounge had a lot of trouble themselves, had a  
11 lot of problems with the 45 Precinct, that was the precinct  
12 that made the arrest in this case. And what's going to be very  
13 important for you is to listen to what Mr. Torres tells you  
14 about the club and what his bouncers tell you about the club.  
15 Pay attention, hear what they say about all the security in the  
16 club, frisking people when they came in, about surveillance  
17 cameras that they had in the club. Pay a lot of attention to  
18 the witnesses that take the stand and the witnesses that don't.

19 Ladies and gentlemen, this case is going to be a case  
20 that in your gut is going to bother you throughout. I promise  
21 you that. And you're going to keep wondering is there more.  
22 Mr. Morgan was not found with a gun on him. And I want you to  
23 listen carefully to the testimony of the police officers who  
24 stopped him. Again, listen to who testifies and who does not.  
25 Remember that the defense has no burden here.

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Opening - Ms. Glavin

1           What I want you to do, not only paying attention to  
2 the surveillance video that the NYPD obtained because if you  
3 look at that video you're going to say to yourselves if that's  
4 Johnny Morgan on that video and he had a gun and he's angry and  
5 it's 4:00 in the morning, why are there four or five guys  
6 hitting him with a water bottle. You actually see them pat him  
7 down. If he had a gun, he was angry, you'd see in that video  
8 he pulls it out. He didn't have a gun.

9           This case is going to raise a lot of questions for you  
10 and it certainly isn't going to come in exactly the way the  
11 government tells you, and that's why it's going to be very,  
12 very important for you to listen to cross-examination. Because  
13 what sometimes happens during trial is that the government will  
14 have a witness on the stand and you'll be thinking, oh, wow,  
15 that makes sense, that person did it. And then all of a sudden  
16 you'll hear on cross-examination, you're like, huh, I didn't  
17 know that. Pay a lot of attention to what Mr. Torres, who is  
18 the owner of the club and his guys, the security guards, what  
19 they say now and what they said in the past about who was there  
20 that night and who did what and who didn't do what.

21           Because at the end of the trial I'm going to ask you,  
22 keep thinking to yourself about the government's case, because  
23 the government asked you to use your common sense. I'm going  
24 to ask you to do something else. I want you to think to  
25 yourselves is this evidence complete, is it reliable and is it

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Opening - Ms. Glavin

1 compelling. Because when I get the chance to stand up here at  
2 the end of the trial and Mr. Morgan is going to need you  
3 probably more than he's ever needed anybody in his life, I'm  
4 going to ask you to find him not guilty.

5 Thank you so much for serving as jurors. Thank you so  
6 much ahead of time for using your common sense and thank you  
7 for doing what's going to be a very, very important job that's  
8 very important to the defense in this case. Thank you.

9 THE COURT: All right, it's shortly before five, so  
10 I'm going to adjourn the proceedings for the evening and ask  
11 that you return tomorrow at 9:00. You'll recall what I said  
12 several times during the course of the day, 9:00 in this  
13 courtroom means 9:00. To the extent that you're not here on  
14 time and we are delayed I will be compelled to try to make up  
15 any lost time by shortening up on the lunch hour or the breaks  
16 or going extra time at the end of the day. Because until we  
17 have a sense of how we're doing on the time that I've estimated  
18 I must maintain the daily schedule that I set out starting and  
19 finishing. So any lateness on the part of the jury is only  
20 going to inconvenience your members as well as the parties in  
21 the case.

22 As you go today to your homes do not discuss the case  
23 among yourselves or with anyone on the outside or have any  
24 contact of any kind with anyone or read any accounts of the  
25 case or do any research, the same instruction that I gave

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Opening - Ms. Glavin

1 during the preliminary instructions and I will give it to you  
2 more than once every day, and that should underscore the  
3 importance of that instruction. So have a good evening and we  
4 will see you tomorrow. When you come in go directly into the  
5 jury room where the clerk will now escort you and wait there  
6 until you're called into the courtroom.

7 (Jury excused)

8 (Continued on next page)

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Opening - Ms. Glavin

1 (In open court; jury not present)

2 THE COURT: Thank you. Be seated. Will the  
3 government give us a summary of the witness list that it has  
4 for tomorrow and if possible for the next day and the order in  
5 which you expect the evidence to come in?

6 MS. GARZON: Yes, your Honor. The government expects  
7 that tomorrow it will call several lay witnesses to start.  
8 First, beginning with Mr. Robert Portela; second, Mr. Jose  
9 Torres; third, Mr. Jamil Toogood; fourth, Mr. Benny Tirado;  
10 fifth, possibly custodial witness to introduce the 911 call  
11 that we discussed earlier today. Sixth, NYPD Officer Josue  
12 Sepulveda; seven, NYPD Officer Alan D'Alessio and NYPD Officer  
13 Chris Lopez, NYPD Officer Christopher Gravius, NYPD Sergeant  
14 Morgan Courgnaud and Detective Salvatore Lacova who we will be  
15 presenting as an expert on the ballistics analysis in this  
16 case.

17 THE COURT: That's all of the witnesses.

18 MS. GARZON: That is, your Honor.

19 THE COURT: How many do you expect to get through --  
20 first, let me get an estimate how long you have on those for  
21 tomorrow. Mr. Portela?

22 MS. GARZON: Direct examination, your Honor, fifteen  
23 minutes.

24 THE COURT: All right. Mr. Torres?

25 MS. GARZON: Probably about 20 to 30 minutes.



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1 THE COURT: Mr. Toogood?

2 MS. GARZON: Ten to fifteen.

3 THE COURT: Mr. Tirado?

4 MS. GARZON: Less than ten minutes.

5 THE COURT: Custodial witness?

6 MS. GARZON: Less than ten minutes.

7 THE COURT: So far that's about one hour. We're in  
8 the middle of the morning. Police Officer Sepulveda?

9 MS. GARZON: Your Honor, I'm not accounting for  
10 cross-examination in my estimates.

11 THE COURT: Understood.

12 MS. GARZON: Officer Sepulveda about 20 to 30 minutes.

13 THE COURT: Mr. D'Alessio?

14 MS. GARZON: Maybe 30 to 40 minutes.

15 THE COURT: Lopez?

16 MS. GARZON: Less than ten minutes.

17 THE COURT: Gravius?

18 MS. GARZON: Gravius and Courgnaud less than ten  
19 minutes.

20 THE COURT: Then Lacova?

21 MS. GARZON: Lacova will be approximately 30 minutes.  
22 Maybe a little bit more.

23 THE COURT: All right, well, depending upon  
24 cross-examination by my estimate there's no reason why all of  
25 these should not be concluded by Wednesday.

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1 MS. GARZON: That is what the government anticipates,  
2 your Honor.

3 THE COURT: All right. And especially that begin  
4 early in the morning and go straight. So we generally squeeze  
5 in somewhere between about six hours of testimony time during  
6 the course of the day.

7 All right, anything from defense?

8 MS. GLAVIN: Yes, your Honor. With respect to -- I've  
9 had discussions with the government about NYPD officers and  
10 their availability and it would appear from the government's  
11 witness list that they do not intend to introduce the  
12 surveillance video that was obtained from outside the  
13 nightclub, in which case we would be introducing it in the  
14 defense case. So we would ask that the government make  
15 Detective Connor available, Detective Efreirej available and we  
16 would ask for the name of the individual at the Tremont  
17 Pharmacy from whom the NYPD obtained the surveillance video for  
18 the early morning hours of February 20th. Unless, of course,  
19 the government wants to stipulate to the admissibility of the  
20 video.

21 THE COURT: Ms. Garzon?

22 MS. GARZON: Your Honor, I think the government is  
23 fine to stipulating the admissibility of the video and we had  
24 asked the defense whether they would be interested in  
25 stipulating to the admissibility of the video, so we would

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1 intend to offer it in our case in chief if we did stipulate to  
2 it.

3 As far as the officer is concerned, we have notified  
4 them that they are to be available for the defense in this case  
5 and the government can provide the name of the pharmacy owner  
6 to defense counsel.

7 THE COURT: All right. All right, thank you. If  
8 there's nothing else, then have a good evening. Ms. Glavin?

9 MS. GLAVIN: Your Honor, with respect to in the order  
10 of the witnesses, with respect to the playing of the 911 call  
11 that would be the call by Mr. Santa that was the subject of  
12 some pretrial discussions this morning, we would like to have  
13 Mr. Santa available to do the cross after the playing of that  
14 911 call, in other words, to impeach him as though he testified  
15 and cross-examined as opposed to having to call him at the very  
16 end of the case and put him on the case in chief.

17 THE COURT: Ms. Garzon?

18 MS. GARZON: Your Honor, as I stated previously,  
19 Mr. Santa has been served with a subpoena in this case. We  
20 would love to have him here. We just don't know if he's going  
21 to come. That's what he's expressed to us in our  
22 conversations. He's very reluctant to come. He is concerned  
23 about his safety and his family's safety. So that's where we  
24 stand with Mr. Santa.

25 MS. GLAVIN: Your Honor, if Mr. Santa does not appear

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1 and we are not able to avail ourselves of Rule 806 we would  
2 move to strike the playing of the 911 call.

3 MS. GARZON: Your Honor, I would just note that  
4 Ms. Glavin has as much power to subpoena Mr. Santa as we do.  
5 As far as I know, I don't believe the defense has subpoenaed  
6 Mr. Santa. But the defense is certainly free to do that to try  
7 to get him here.

8 MS. GLAVIN: Just note for the record he's under  
9 federal subpoena to appear and it is a crime if he does not  
10 appear.

11 THE COURT: Ms. Garzon, have you made clear to  
12 Mr. Santa that there are potential penalties associated with  
13 refusing to appear in response to a subpoena?

14 MS. GARZON: Yes, your Honor. On multiple occasions  
15 we have.

16 THE COURT: All right, Ms. Glavin, I think that on a  
17 tactical basis it would be best if you would issue your own  
18 subpoena as well.

19 MS. GLAVIN: Yes, your Honor. We will do that.

20 THE COURT: So you don't be in a situation where you  
21 say the government didn't try hard enough.

22 MS. GLAVIN: We will, your Honor, and if the  
23 government could cooperate with us in terms of giving us his  
24 address and contact information.

25 MS. GARZON: I just know that the defense already has

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1 that address.

2 I'd like to make one further comment, your Honor, with  
3 respect to Officers Connor and Efreirej so the government could  
4 be clear with them about what their expectations are, I guess,  
5 I don't know when they should be told to be here.

6 MS. GLAVIN: I think we can work that out.

7 THE COURT: We'll get a better sense of that by the  
8 end of business tomorrow. All right. Thank you, have a good  
9 evening.

10 (Adjourned to October 1, 2013 at 9:00 a.m.)  
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